Supreme Court, U.S.
FILED
JAN 23 2008
OFFICE OF THE CLERK

No. 07-971

81

In The Supreme Court of the United States

JOHN McKINLEY BEESON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Robert L. McClellan
Counsel of Record
IVEY, McCLELLAN,
GATTON & TALCOTT, L.L.P.
100 South Elm Street, Suite 500
Greensboro, North Carolina 27401
(336) 274-4656

Counsel for Petitioner

THE LEX GROUP^{DC} ◆ 1750 K Street N.W. ◆ Suite 475 ◆ Washington, DC 20006
(202) 955-0001 ◆ (800) 815-3791 ◆ Fax: (202) 955-0022 ◆ www.thelexgroupdc.com

Questions Presented For Review

I. Whether the Court of Appeals for the Fourth Circuit erred in ruling that the Defendant's appeal was subject to appellate waiver, and that the Defendant's appeal was properly dismissed.

II. Whether the District Court erred by imposing the sentence under 18 U.S.C. § 3553(a), without consideration of alternative factors and issues in mitigation, which were not addressed, or previously disapproved, by the United States Sentencing Guidelines.

Parties to the Proceeding

The following list identifies all parties appearing before this Court, and before the United States Court of Appeals for the Fourth Circuit:

The Petitioner here and the Appellant/Defendant below, through Robert L. McClellan, Attorney at Law.

The Respondent here and the Appellee/Plaintiff below, by the United States of America.

Table of Contents

Page

Questions Presented For Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Statutes Involved 1

Statement of the Case 2

Procedural Issues for Review 4

Argument 7

ISSUE I. The Petitioner, John Beeson did not waive review of the issues under the limitations or scope of the appellate waiver. 7

A. BEESON IS ENTITLED UNDER THE APPELLATE WAIVER TO RAISE ISSUES OF CONSTITUTIONAL OR FUNDAMENTAL IMPORT TO THE FAIRNESS OF HIS SENTENCE 8

B. UNDER RULE 11, THE DISTRICT COURT PROVIDED DIRECTION TO THE DEFENDANT WHO IS ENTITLED TO APPEAL "ANYTHING OF AN UNCONSTITUTIONAL NATURE", WITHIN THE PLEA COLLOQUY 10

C. THE COURT'S OMISSION OF CONSIDERATION OF ELEMENTS UNDER 28 U.S.C. § 994(d) WAS A FUNDAMENTAL MISCARRIAGE OF JUSTICE 12

ISSUE II. The District Court erred by not considering factors under 28 U.S.C. § 994(d), and as a result there was a violation of the Due Process afforded to the Defendant under the Fifth Amendment to the United States Constitution, in that factors related to sentencing were not taken into account by the Trial Court 14

Conclusion 23

APPENDIX

Judgment
filed April 23, 2007 ..... 1a

Amended Judgment in a Criminal Case
filed October 4, 2006 ..... 2a

Order of
The Honorable William L. Osteen
Re: Denying Petition for Rehearing
entered October 30, 2007 ..... 6a

U.S. CONST. amend. V 7a

18 U.S.C. § 922(j) 8a

18 U.S.C. § 924(a)(2) 9a

18 U.S.C. § 924(c)(1)(a)(ii) 10a

18 U.S.C. § 3553 ..... 11a

21 U.S.C. § 841(b)(1)(C) 21a

21 U.S.C. § 846 ..... 23a

28 U.S.C. § 994 ..... 24a

Excerpt of Transcript of
Change of Plea Hearing before
The Honorable William L. Osteen, Sr.
on March 28, 2006 ..... 39a

Table of Authorities

Page(s)

Cases

Abney v. United States,
431 U.S. 651, 97 S. Ct. 2034,
52 L. Ed. 2d 651 (1977) 8

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 25 (2004) 6, 13, 14

Caldwell v. Mississippi,
472 U.S. 320, 105 S. Ct. 2633,
86 L. Ed. 2d 231 (1985) 12

Crane v. Kentucky,
476 U.S. 683, 106 S. Ct. 2142,
90 L. Ed. 2d 636 (1986) 21

Gall v. United States,
_____ U.S. _____, 128 S. Ct. 586,
_____ L. Ed. 2d _____(2007) 19, 20, 24

Gardner v. Florida,
430 U.S. 349, 94 S. Ct. 1197,
51 L. Ed. 2d 393 (1977) 23

Holmes v. South Carolina,
1728 U.S. ____, 126 S. Ct. 1727,
164 L. Ed. 2d 503 (2006) 21

Koon v. United States,
518 U.S. 81, 116 S. Ct. 2035,
135 L. Ed. 2d 392 (1996) 20

Mellane v. Cent. Hanover Bank and Trust Company,
339 U.S. 306, 70 S. Ct. 652,
94 L. Ed. 865 (1950) 23

Mistretta v. United States,
488 U.S. 361, 109 S. Ct. 647,
1002 L. Ed. 2d 714 (1989) 14, 21, 22

Rita v. United States,
551 U.S. ____, 127 S. Ct. 2456,
168 L. Ed. 2d 203 (2007) 19

United States v. Attar,
38 F.3d 727 (4th Cir. 1994), *cert. denied*,
115 S. Ct. 1957, *rehearing denied*,
116 S. Ct. 27 (1995) 10

United States v. Ausburn,
502 F.3d 313 (3rd Cir. 2007) 23

United States v. Blick,
408 F.3d 162 (4th Cir. 2005) 9, 10

United States v. Booker,
543 U.S. 220 (2005) 13

United States v. Booker,
125 S. Ct. 738,
160 L. Ed. 2d 621 (2005) ..... *passim*

United States v. Buchanan,
59 F.3d 914 (9th Cir. 1995), *cert. denied*,
116 S. Ct. 430 (1995) 11

United States v. Caruthers,
458 F.3d 459 (6th Cir. 2006), *cert. denied*,
127 S. Ct. 752 (2006) 14

United States v. Hahn,
359 F.3d 1315 (10th Cir. 2004) 13

United States v. Hughes,
401 F.3d 540 (4th Cir. 2005) 13, 14, 15

United States v. Khattak,
273 F.3d 557 (3rd Cir. 2001) 13

United States v. Mannino,
212 F.3d 835 (3rd Cir. 2000) 23

United States v. Marin,
961 F.2d 493 (4th Cir. 1992) 8

United States v. Poindexter,
492 F.3d 263 (4th Cir. 2007) 12

United States v. Ross,
501 F.3d 851 (7th Cir. 2007) 23

United States v. Teeter,
257 F.3d 14 (1st Cir. 2001) 13

United States v. Wiggins,
905 F.2d 51 (4th Cir. 1990) 8

United States v. Wilken,
498 F.3d 1160 (10th Cir. 2007) 11

Constitutional Provisions

U.S. CONST. amend. V 14, 15

U.S. CONST. amend. VI 15, 21

U.S. CONST. amend. XIV 21

Statutes

18 U.S.C. § 922(j) 2

18 U.S.C. § 924(a)(2) and (2) 2

18 U.S.C. § 924(c) 4, 6

18 U.S.C. § 924(c)(1)(A)(ii) 1, 2

18 U.S.C. § 3553 ..... 2, 18, 21

18 U.S.C. § 3553(a) ..... *passim*

18 U.S.C. § 3553(b) 15

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 841(b)(1)(C) 1, 2

21 U.S.C. § 846 ..... 1, 2

28 U.S.C. § 994 ..... 2, 13, 17

28 U.S.C. § 994(d) ..... *passim*

28 U.S.C. § 994(d)(1) 17

28 U.S.C. § 994(d)(2) 17

28 U.S.C. § 994(d)(4) 17

28 U.S.C. § 994(d)(5) 17

28 U.S.C. § 994(d)(7) 17

28 U.S.C. § 994(d)(9) 16

28 U.S.C. § 1254 1

Guidelines

U.S.S.G. § 5, Part A 16

U.S.S.G. § 5H1.1 17

U.S.S.G. § 5H1.2 17

U.S.S.G. § 5H1.3 17

U.S.S.G. § 5H1.6 17

U.S.S.G. § 5K2.0-(d)(2) 17

U.S.S.G. § 5K2.13 17

Opinions Below

The Defendant appealed the findings and omissions of the District Court judgment in a criminal case filed on July 27, 2006. This judgment was further amended by the District Court on October 4, 2006, unrelated to issues on appeal.

The Opinion of the United States Court of Appeals for the Fourth Circuit was a Judgment of Dismissal filed on April 23, 2007 in Case Number 06-4815.

Subsequent to the issuance of the judgment of the Court, the Appellant filed a Petition for Rehearing. The Judgment of Dismissal from this Petition for Rehearing was filed by the Fourth Circuit on October 30, 2007.

Jurisdiction

The United States Court of Appeals for the Fourth Circuit entered its Judgment and Denial of the Petition for Rehearing on October 30, 2007. The Supreme Court has jurisdiction under 28 U.S.C. § 1254.

Statutes Involved

This case involves the United States Constitution, Amendment Five, regarding issues of Due Process. The Defendant was charged by a superseding Indictment on February 1, 2006, and pled Guilty to Federal Statutes 21 U.S.C. §§ 846 and 841(b)(1)(C), 18 U.S.C. § 924(c)(1)(A)(ii) and 18

U.S.C. §§ 922(j), 924(a)(2) and (2). The Defendant was sentenced by the Trial Court under application of 18 U.S.C. § 3553. The Sentencing Guidelines and application are set by policy under 28 U.S.C. § 994. (Appendix, Page 7(a))

Statement of the Case

On January 14, 2005, law enforcement officers of the Randolph County, North Carolina area were investigating drug and weapon violations of several individuals, including Jeff Nicholas Hill, Matthew Braxton Barker and John McKinley Beeson, the Petitioner. The officers observed these individuals loading items from a house into three vehicles. As the officers were investigating drug and gun possession of related individuals, officers stopped the vehicles of Beeson and Hill after leaving the house as part of their investigation. Subsequent searches of the vehicle resulted in the arrest of the individuals, after locating drugs and pharmaceuticals in the vehicles.

This investigation resulted in the indictment of John McKinley Beeson on December 19, 2005 for charges related to Conspiracy to Distribute Oxycodone under 21 U.S.C. §§ 846 and 841(b)(1)(C), Distribution of Oxycodone under 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), Brandishing a Firearm in Relation to a Drug Trafficking Crime under 18 U.S.C. § 924(c)(1)(A)(ii) and Possession of Stolen Firearms under 18 U.S.C. §§ 922(j), 924(a)(2) and 2. On the date of trial, subject to the Plea Agreement, Beeson plead guilty to the above charges. The

remainder of the counts were dismissed, as part of the plea agreement.

A portion of the Plea Agreement contained an appellate waiver. Included in the Plea Agreement filed on March 28, 2006, the Defendant expressly waived the right to appeal the conviction and whatever sentence imposed on any ground, accepting the defendant's right to appeal based on grounds of "(1) ineffective assistance of counsel, (2) prosecutorial misconduct not known to the defendant at the time of the defendant's guilty plea, (3) a sentence in excess of the statutory maximum, (4) a sentence based on an unconstitutional factor, such as race, religion, ethnic origin and gender." (Beeson Plea Agreement) At the time of the plea colloquy, the Trial Court went over these terms, but included the understanding that the Defendant could appeal, "if the Court sentences you improperly because of your race, creed, color, national origin, anything of an unconstitutional means the Court uses to sentence you, you would have a right to appeal on that ground". (Appendix, Page 42(a)). Beeson indicated his understanding of these comments, and there was no objection from any party of the Trial Court's understanding or the Defendant's ability to so appeal.

Subsequently, the case was set on for sentencing, on July 21, 2006. The Defendant filed objections to the Presentence Report, and in particular, raised an objection to (a) computation of base level offense drug amounts, (b) the adjustment for participation, (c) obstruction of justice, and

further argued as to disparative sentencing between co-defendants.

On July 21, 2006, Beeson was sentenced by the District Court. The Trial Court determined that the Presentence Report was correct in its application of the Guidelines. The Court considered 18 U.S.C. § 3553(a), and sentenced Mr. Beeson to 151 months, as the lowest sentence within the Guidelines for the consolidated drug and possession counts. Eight-four months was imposed consecutively for Count 7, under 18 U.S.C. § 924(c). The judgment was later signed by the Trial Court as to the Defendant. The Defendant gave Notice of Appeal on July 31, 2006. An Amendment of Judgment was entered on October 4, 2006, due to clerical error.

Procedural Issues for Review

As a portion and within the scope of his appellate waiver, Beeson contends that he is eligible to enter Notice of Appeal under the terms of the plea agreement, which were specifically set out terms within the Plea Agreement, but was also explained to him by Judge Osteen in the colloquy to the plea.

The Trial Court explained limitations of the appellate waiver at the plea change hearing, but in expressing the condition of the fourth exception, the Court stated "And fourthly, if the Court sentences you improperly because of your race, creed, color, national origin, anything of any unconstitutional means that the Court uses to sentence you, you have the right to appeal on that ground." (emphasis added). (Appendix Page 42(a)).

There was no objection to this statement in Court, and the Defendant indicated he understood the terms of the plea waiver as stated by the Court.

As issues in mitigation for sentencing, Beeson contended that he had limited involvement in the conspiracy, that he was not aware of all the circumstances regarding co-defendant Davis' plans and activities, nor was Mr. Beeson aware that some of his activities were in furtherance of a burglary.

The other factors that Beeson contends were not taken into account by the Trial Court, due to the nature of the Sentencing Guidelines, and in particular to the format and language of 18 U.S.C. § 3553(a) were the following: his age, his activities within the community and family, his family ties and responsibilities, his educational and vocational skills, and his mental and emotional condition related to his age, substance abuse, and his role in connection to the conspiracy, which was largely directed by older members. (The Defendant was age 19 at the time of the alleged offense.)

The Court also reviewed whether Beeson was involved in the obstruction of justice, in that John Beeson had phoned his father while in custody to ask his father, Blake Beeson, to dispose of certain firearms. While having this conversation with his father, Beeson observed that most likely the conversation was being overheard by phone monitoring. No attempt was made to dispose of the weapons. The result from the monitored telephone conversation was that law enforcement authorities were able to later obtain the weapons without

intervention or further investigation. The Court did find that there was obstruction in the nature of the phone call, and that the drug quantities alleged by the probation officer were correct. The Trial Court then imposed a sentence at Level 34, Criminal History Category I, with Counts 3 and 7 of the Guideline Sentence that 151 months, to be followed by the count for 18 U.S.C. § 924(c) which was 84 months consecutive to the other counts.

The Trial Court in consideration of *Blakely* and *Booker*, found the Guideline Sentence, utilized in the Presentence Report. Under considerations of 18 U.S.C. § 3553(a), the Court found it could not disagree with the Guideline Sentences, as they provided a reasonable sentencing in this case. The Court did not find or announce any consideration of other factors that would be present for the Court to consider for a sentence before the Guideline Range, or outside of the considerations of 18 U.S.C. § 3553(a).

Beeson contends that, because the Court had selected a sentence within the Guideline Range, without consideration of any mitigating factors outside the Federal Sentencing Guidelines, or by a misapplication of 18 U.S.C. § 3553(a), the Court did not consider other relevant and applicable factors. These factors are addressed under 28 U.S.C. § 994(d), and as such, the Court did not apply Due Process by excluding certain factors that Congress has deemed relevant and material. Beeson exercised his rights under the appellate waiver to raise constitutional issues as to the Court's sentencing, and gave Notice of Appeal. The Petitioner contends

that the appeal was within the scope of the appellate waiver.

Argument

ISSUE I. The Petitioner, John Beeson did not waive review of the issues under the limitations or scope of the appellate waiver.

A. Beeson is entitled under the appellate waiver to raise issues of constitutional or fundamental import to the fairness of his sentence.

B. Under Rule 11, the District Court provided direction to the Defendant that he was entitled to appeal anything of an unconstitutional nature, within the plea colloquy.

C. The District Court's omission of consideration of elements under 28 U.S.C. § 994(d) was a fundamental "miscarriage of justice", and should allow remand for sentencing.

ISSUE II. The District Court erred by not considering factors under 28 U.S.C. § 994(d), and as a result, there was a violation of the Due Process afforded to the Defendant under the Fifth Amendment to the United States Constitution, in that relevant and material factors related to sentencing were not taken into account by the District Court.

ISSUE I

A. BEESON IS ENTITLED UNDER THE APPELLATE WAIVER TO RAISE ISSUES OF CONSTITUTIONAL OR FUNDAMENTAL IMPORT TO THE FAIRNESS OF HIS SENTENCE.

The Petitioner, John McKinley Beeson, did not waive appellate review of the issues brought forth under the terms of the Plea Agreement entered into.

It is well settled that there is no constitutional right to an appeal. *Abney v. United States*, 431 U.S. 651, 656, 97 S. Ct. 2034, 2038, 52 L. Ed. 2d 651 (1977). The Courts have generally upheld the fact that Defendants may waive constitutional rights when such a waiver is knowingly and voluntarily made. *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990).

A waiver is not knowing or voluntarily made if the District Court fails to appropriately discuss the waiver provisions under the Rule 11 colloquy, or the Defendant did not fully understand the significance of his waiver. Whether a Defendant effectively waived his right to appeal is a matter of law that the courts review de novo. *United States v. Marin*, 961 F.2d 493 (4th Cir. 1992). The Defendant contends however, that there are no waivers of his constitutional rights, where those rights are reserved or expressly preserved by the Plea Agreement and colloquy.

In the plea colloquy, the Trial Court clearly stated, without objection, "and fourthly, if the Court sentences you improperly because of your race, creed, color, national origin, anything of an unconstitutional means that the Court uses to sentence you, you would have a right to appeal on that ground". (Appendix, Page 42(a)).

The validity of a waiver depends on whether the Defendant knowingly and intelligently agreed to waive the right to appeal, and is made on a case by case determination. *United States v. Blick*, 408 F.3d 162, 169 (4th Cir. 2005). Although this determination is often made based on the adequacy of the plea colloquy, specifically, whether the District Court questioned a Defendant about the appeal waiver-the issue ultimately is "evaluated by reference to the totality of the circumstances." *Id.* In this occasion, Beeson did not waive constitutional issues, by the nature of the understanding of the District Court, and by the understanding of the Defendant at the plea colloquy. The scope of the appellate waiver both as expressed by the Court, and the waiver from the Plea Agreement which states an exception is present for "a sentence based on an unconstitutional factor, such as race, religion, ethnic origin and gender". (Beeson Plea Agreement). The language is not limiting, but indicates that there are a number of unconstitutional factors that would be subject to review, other than those enumerated.

The courts will enforce the waiver to preclude a Defendant from appealing a specific issue of the record established as that the waiver is valid and that the issue being appealed is within the scope of

the waiver. *Blick*, at 168, (quoting *U.S. v. Attar*, 38 F. 3d 727, 731-733 (4th Cir. 1994) cert. denied, 115 S. Ct. 1957, rehearing denied, 116 S. Ct. 27 (1995)). As stated within *Attar*, "...for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations." *Attar* at 732.

Seeking the same review as in *Attar*, the Defendant contends that a constitutional violation occurred by the lack of consideration of factors that Congress has deemed significant for inclusion as potentially relevant within 28 U.S.C. § 994(d), and whether the Trial Court took none of these factors into consideration.

B. UNDER RULE 11, THE DISTRICT COURT PROVIDED DIRECTION TO THE DEFENDANT WHO IS ENTITLED TO APPEAL "ANYTHING OF AN UNCONSTITUTIONAL NATURE", WITHIN THE PLEA COLLOQUY.

In Beeson's case, the Trial Court clearly addressed the appellate waiver, as part of the Plea Agreement. The Trial Court clearly understood the lack of limitation in the Plea Agreement terms to mean the Petitioner could appeal "anything of an unconstitutional nature that was used to impose a sentence." This being the understanding of the Petitioner, Beeson wishes to appeal the constitutional issue related to factors that were not taken into account at sentencing, in violation of Due Process. The Petitioner contends the Court is bound

by the plea colloquy, as the Petitioner was, and this was the Petitioner's understanding.

Presently, there are splits within the Circuit Courts, as to the nature and means by which the colloquy will be important to the waiver of appellate rights.

Some circuits have addressed the colloquy as being a literal review of the plea, and place the import on the Trial Court's statements, as to the understanding of Court and the defendant.

This is shown within the case of *United States v. Buchanan*, 59 F.3d 914 (9th Cir. 1995) cert. denied, 116 S. Ct. 430 (1995). The Ninth Circuit has clearly stated that issues related to the plea colloquy are fundamental to understanding an appellate waiver. In that case, because of the District Court Judge's statements, the Defendant Buchanan could have reasonably have expected that he could appeal his sentence. The Court found that the oral pronouncement must control, in that Buchanan could have no reason but believe the Court's advice on the right to appeal was correct. Litigants need to be able to trust the oral pronouncements of District Court judges. *Buchanan* at 918.

A similar circumstance occurred in the case of *United States v. Wilken*, 498 F.3d 1160 (10th Cir. 2007). In that occasion where the Sentencing Courts mischaracterization of an appellate waiver occurred, prior to the entry of the Guilty Plea, it created material ambiguity as to the clear, unambiguous waiver in the Plea Agreement. Due to that

ambiguity, the Tenth Circuit determined that they could not conclude the waiver of Mr. Wilkin was knowing and voluntary, and therefore, the Tenth Circuit did not consider that to be waiver.

Based on the ambiguity, and the avoidance of fundamental fairness that would be applied against Beeson, should the waiver be upheld, the Petitioner contends he is entitled to have a hearing on the merits. Beeson further contends any split in the circuits creates a pattern of misunderstanding, as to the importance and need for the plea colloquy to be clear and complete. A lesser standard makes the sentencing hearing less reliable, as required by *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

C. THE COURT'S OMISSION OF CONSIDERATION OF ELEMENTS UNDER 28 U.S.C. § 994(d) WAS A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

Various courts have attempted to construe appropriately the nature of an appellate waiver. Several courts, including the Fourth Circuit, continue to use a two-step approach seeking to determine whether the appellate waiver is knowingly and intelligently made, and whether the issue falls within the scope of the appellate waiver. *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007).

Other circuits have taken a slightly different approach. Several circuits, including the Third Circuit, First Circuit, the Fifth Circuit and Tenth

Circuit have adopted a 3 prong approach. See *United States v. Hahn*, 359 F.3d 1315, 1322 (10th Cir. 2004) (en banc), *United States v. Khattak*, 273 F.3d 557 (3rd Cir. 2001) and *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001). These courts require a waiver of rights entered into knowingly and voluntarily. Furthermore, the District Court must inquire specifically at the change of plea hearing and colloquy as to the defendant's understanding of the waiver of appellate rights. Additionally, by an additional coda or requirement, if denying a right to appeal would work a miscarriage of justice, the Appellate Court, in its sound discretion, may refuse to honor the waiver. See *Teeter*, 257 F.3d at 25.

The Defendant contends that to require him to undergo sentencing, without consideration of mitigating factors that are clearly in his favor, and which have been addressed by Congress is a miscarriage of justice. These were important considerations to be taken into account prior to the cases of *Blakely*, 542 U.S. 296 (2004), *Booker*, 543 U.S. 220 (2005) infra, and as applied in the Fourth Circuit of the *United States v. Hughes*, 401 F.3d 540 (4th Cir. 2005) The Defendant contends that he is suffering from a miscarriage of justice, by the Court's failure to consider other issues, and that he is entitled to re-sentencing under the significant factors of the case which include age, influence, drug dependence, education, or lack thereof, family ties, and other factors considered under 28 U.S.C. § 994.

In that there is a split of circuits regarding application of the "miscarriage of justice", and that such a definition of "miscarriage" is not uniformly

arrived at, Beeson is entitled to hearing on the merits, re-sentencing, and a reasonable opportunity for the Trial Court to consider these factors.

For the foregoing reasons, the Defendant contends that the appeal taken is within the exceptions to the appellate waiver, is contrary to the plea colloquy held with the Trial Court, that will inherently result in a miscarriage of justice should these factors not be taken into account at sentencing.

The Petitioner further contends that the jurisdiction of the Appellate Court is not divested by means of appellate waiver. See *United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2006) (footnote 6), cert. denied, 127 S. Ct. 752 (2006).

ISSUE II. The District Court erred by not considering factors under 28 U.S.C. § 994(d), and as a result there was a violation of the Due Process afforded to the Defendant under the Fifth Amendment to the United States Constitution, in that factors related to sentencing were not taken into account by the Trial Court.

The Supreme Court of the United States considered the constitutionality of the Guidelines in *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102, L. Ed. 2d 714 (1989), *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 25, 31 (2004), and later in the *United States v. Booker*, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). The Fourth Circuit addressed the application of *Booker* under *United States v. Hughes*, 401 F. 3d 540 (4th Cir. 2005).

The holdings of *Hughes*, as is taken by the Fourth Circuit, would consider the Sentencing Guidelines to be unconstitutional as applied, but that the Guidelines were relevant and were to use by the Sentencing Courts in an advisory capacity. In particular, the Lower Courts have been instructed that the sentencing judge is to use the correct procedures by the exclusion of 18 U.S.C. § 3553(b).

Beeson contends, in part, that the Trial Court, in utilizing 18 U.S.C. § 3553(a) solely, by an abuse of discretion, and not considering alternative factors, erroneously concluded that a sentence within the appropriate Guideline range was appropriate. The abuse of discretion in this case, is that the Trial Court unconstitutionally referred only to 18 U.S.C. § 3553(a), but did not apply other factors outside of the Guidelines. The advisory capacity of the Guidelines would be considered relevant, but is not all exclusory. The District Court should have included issues that Congress has deemed to be relevant to sentencing under 28 U.S.C. § 994(d).

Beeson raises this as a constitutional deficiency. Issues of Due Process, as dictated under the Fifth Amendment, or as construed by the Sixth Amendment, under *Booker*, require the ability to address factors outside the Guidelines as part of a defense or mitigation.

Congress, in establishing the Sentencing Guidelines lists factors that should be considered by the Sentencing Guideline Commission, and arguably the District Courts. Those matters, which may be deemed relevant in 28 U.S.C. § 994(d) include: (to

the extent that they have relevance), (1) age; (2) education; (3) vocational skills; (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant; (5) physical condition, including drug dependence; (6) previous employment records; (7) family ties and responsibility; (8) community ties; (9) role in the offense; (10) criminal history; and (11) degree of dependence upon criminal activity for livelihood.

These were all factors noted by Congress as issues which should be considered at the time of sentencing, for which Congress directed the Sentencing Commission to include some method by which these items would be taken into account during the course of sentencing review, if relevant. The Sentencing Commission was empowered to detail how, and if, these factors would be considered. (pre-*Booker*).

Subsequent to Congress establishing a list of priorities for the Commission to take into account, and leaving it within the discretion of the Sentencing Commission as to how to apply these Guidelines, the Guidelines were adopted and issues were determined as to what role they would play within the sentencing method.

Certain factors developed by the Sentencing Commission have a great impact on sentencing. (See 28 U.S.C. § 994(d)(9), related to "role in the offense" and (d) (10) "criminal history" and how they influence the sentencing table, U.S.S.G. § 5 part A). Some factors, considered important and mentioned

by Congress, received little or no application under the Guidelines whatsoever.

Some of these separate comparative factors include:

(1) U.S.S.G. § 5K2.13, diminished capacity policy statement regarding voluntary use of drugs in comparison to 28 U.S.C. § 994(d)(5); (2) age of the Defendant as set out under U.S.S.G. § 5H1.1 age (policy statement) in comparison to 28 U.S.C. § 994(d)(1); (3) acceptance of and responsibility under U.S.S.G. § 5K2.0-(d)(2), whether a Defendant, like Beeson has otherwise provided information about his involvement or some factor would create less than substantial assistance in comparison to 28 U.S.C. § 994(d)(5); (4) family ties and responsibilities under U.S.S.G. § 5H1.6 compared to 28 U.S.C. § 994(d)(7), which especially recognizes family ties; and (5) U.S.S.G. § 5H1.2 education and vocational skills compared to 28 U.S.C. § 994(d)(2), expressly considering education; U.S.S.G. § 5H1.3 compared to 28 U.S.C. § 994(d)(4) regarding mental and emotional condition, which may examine a number of conditions related to the Defendant.

These mitigating factors, although unimportant to Sentencing Commission's list of priorities, were important to Congress, which resulted in a recognition of some factors deemed relevant 28 U.S.C. § 994. There were several of these factors outlined, explained and were recognized in the Presentence Report for Mr. Beeson, making these subject to the Trial Judge's knowledge

and review. The District Court did not acknowledge them for sentencing.

The mandate of Congress to consider these factors, and the directive of the Sentencing Commission (post-*Booker*) creates a disjunctive pattern within sentencing. The result of this application meant that the Trial Judge inherently rejected, by use of the Guidelines under 18 U.S.C. § 3553(a), a number of those factors that may be important to the Defendant toward receiving a downward departure or variance.

By the application of 18 U.S.C. § 3553 in Federal sentencing, the Trial Court inherently used the application of the Guidelines in imposing sentence. By using solely 18 U.S.C. § 3553(a), the Court was excluding some factors that Congress took into account and stated would have importance to the Guidelines, if relevant. This means that the Sentencing Court has precluded a number of factors in its determination of sentence. Only if the Sentencing Trial Court did consider these factors, outside of the Sentencing Guidelines, can full mitigation be considered. Only if factors under 28 U.S.C. § 994(d) were fully explored would Due Process be satisfied.

18 U.S.C. § 3553(a) tells the Trial Court to consider sentencing ranges established as issued by the Sentencing Commission, or consider any pertinent policy statement issued by the Sentencing Commission. In no part does 18 U.S.C. § 3553(a) impart to the Judge that he must consider issues

outside Sentencing Guidelines. To avoid doing so renders the Guidelines mandatory, once again.

Ultimately, in Mr. Beeson's case, there was not any consideration of these factors at all. Each one of these factors in Mr. Beeson's case, including age, drug dependency, mental health, family ties, acceptance and responsibility, would have been important for consideration for downward departure for Mr. Beeson. This is inherently true where Mr. Beeson's sentence was at the lowest possible Guideline Sentence the Trial Court could choose. By precluding those circumstances that are relevant to the Defendant, and although determined by Congress to be important factors in determining sentence, the Defendant could not have been afforded Due Process where the Trial Court inherently precluded important relevant factors that the Court should take into account and use in sentencing.

In that Mr. Beeson was afforded the lowest sentence within the determined Guideline Range, and in seeking a "presumptive result", within the Guidelines, the District Court may have improperly precluded itself from the options of going below that range, and utilized other factors that should be considered under 28 U.S.C. § 994(d).

The Petitioner is aware of sentencing circumstances and the holdings addressed within *Rita v. United States*, 551 U.S. ____ , 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007), and *Gall v. United States*, ____ U.S. _____, 128 S. Ct. 586, _____ L. Ed. 2d _____ (2007).

Each of these cases dealt with the presumptive issues related to application of Sentencing Guidelines by the Court of Appeals. The Petitioner has no quarrel with these cases, as long as the Trial Court justly considered mitigating factors that were formerly precluded by the Guidelines. As stated in *Gall*, "It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue". *Gall* at 598, Quoting *Koon v. United States*, 518 U.S. 81, 98, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996).

While there is no issue with the deferential "abuse of discretion" standard applied to sentencing decisions, the Petitioner contends that under the holdings that the Guidelines applied in a mandatory fashion is unconstitutional, this inherently requires the Trial Court to consider factors outside the Guidelines, including those issues that the Guidelines previously precluded from consideration.

The Trial Court in Beeson's case certainly made its findings with regard to the application of the Guidelines, and how they would be prescribed, but there is no mention within the Court's sentence, or the application of factors in 28 U.S.C. § 994(d), that would have a bearing on which issues the Court would offer in its consideration separate from the Guidelines, when the Guidelines themselves specifically preclude certain factors from consideration.

Since the Court may have automatically considered these factors unavailable for consideration and specifically sentenced the Defendant at the low end of Guideline Range, the Defendant contends he is entitled to hearing at sentencing in which the Court has annunciated its consideration of factors outside the Guidelines that it might deem important, or that these factors have been considered are not deemed to have significant value. Review of 18 U.S.C. § 3553, solely, places the Guidelines in a mandatory posture, again.

This becomes an issue in which the Defendant's Federal constitutional rights are violated by an evidence or sentencing rule in which the Defendant may not introduce evidence of other issues.

This matter was treated in *Holmes v. South Carolina*, 1728 U.S. ____, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). It stated in that case, "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a 'a meaningful opportunity to present a complete defense." Quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

The resulting issue of constitutionality returns to *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 1002 L. Ed. 2d 714 (1989). Mistretta states:

> Congress set forth eleven factors for the Commission to consider in establishing categories of defendants. These include the offender's age, education, vocational skills, mental and emotional condition, physical condition (including drug dependence), previous employment records, family ties and responsibilities, community ties, role in the offense, criminal history, and degree of dependence upon crime for a livelihood. Congress also prohibited the Commission from considering the "race, sex, national origin, creed and social or economic status of offenders". *Mistretta*, 109 S. Ct. 656-657.

In quoting the intent of Congress and the mechanism by which each sentencing issue acts in relationship to others, the constitutionality of the sentencing process in the Federal system mandates the need for review of <u>all</u> available factors. The Trial Court, by inherently excluding issues that the Guidelines did not take into account, even after the Guidelines are now only advisory, created an unconstitutional error, for which this matter should be returned for re-sentencing. Omission of these issues results in a miscarriage of justice.

Due process is an inherent part of the issues in Beeson's case:

> In general, procedural due process requires "at a minimum...deprivation of life, liberty or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case". *Mellane v. Cent. Hanover Bank and Trust Company*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950). In the criminal context, "The sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause". *Gardner v. Florida*, 430 U.S. 349, 358, 94 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); accord *United States v. Mannino*, 212 F.3d 835, 845-846 (3rd Cir. 2000) (obviously a criminal defendant must be afforded due process at sentencing). See *U.S. v. Ausburn*, 502 F.3d 313, 322 (3rd Cir. 2007).

The issues inherent to Beeson's case have been noted by other Circuits and addressed by vacating the sentence and remanding for sentence. See *United States v. Ross*, 501 F.3d 851 (7th Cir. 2007).

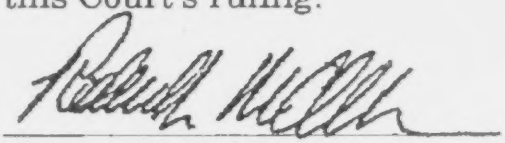
Conclusion

The Petitioner's claim of prejudice is twofold, (1) the failure of the Appellate Court to recognize the validity of his appeal under the terms of the appellate waiver and (2) the abuse of discretion of the District Court in not reviewing issues in

mitigation, outside consideration of the Federal Sentencing Guidelines.

This Court should review these matters, as there are apparent violations of this Court's directives under *Booker* and *Gall*, and the split within circuits as to how appellate waivers should be applied.

The Petitioner contends his appeal should be reviewed on its merits, and he seeks remand for sentencing considering all mitigating factors, and in compliance with this Court's ruling.



Robert R. McClellan
IVEY, McCLELLAN,
GATTON & TALCOTT, L.L.P.
Post Office Box 3324
Greensboro, North Carolina 27402
Telephone: 336-274-4658
Facsimile: 336-274-4540

APPENDIX
TABLE OF CONTENTS

Appendix Page

Judgment
filed April 23, 2007 ..... 1a

Amended Judgment in a Criminal Case
filed October 4, 2006 ..... 2a

Order of
The Honorable William L. Osteen
Re: Denying Petition for Rehearing
entered October 30, 2007 ..... 6a

U.S. CONST. amend. V 7a

18 U.S.C. § 922(j) 8a

18 U.S.C. § 924(a)(2) 9a

18 U.S.C. § 924(c)(1)(a)(ii) 10a

18 U.S.C. § 3553 ..... 11a

21 U.S.C. § 841(b)(1)(C) 21a

21 U.S.C. § 846 ..... 23a

28 U.S.C. § 994 ..... 24a

Excerpt of Transcript of
Change of Plea Hearing before
The Honorable William L. Osteen, Sr.
on March 28, 2006 ..... 39a

JUDGMENT
[ENTERED: April 23, 2007]

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-4815
1:05-cr-00315-2

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

JOHN MCKINLEY BEESON

Defendant – Appellant

Appeal from the United States District Court for the Middle District of North Carolina at Durham

In accordance with the written order of this Court filed April 20, 2007, the Court dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

[ENTERED: OCTOBER 4, 2006]

UNITED STATES OF AMERICA

v.

JOHN MCKINLEY BEESON

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After
November 1, 1987)

Case Number: 1:05CR315-2
USM Number: 22969-057

Defendant's Attorney A. Wayne Harrison

DATE OF ORIGINAL JUDGMENT:
*July 21, 2006

REASON FOR AMENDMENT:
*Correction of Sentence for Clerical Mistake
(Fed. R. Crim. P. 36))

THE DEFENDANT:

X pleaded guilty to counts 3s, 7s, 8s, and 18s

__ pleaded nolo contendere to count(s) __ which was accepted by the court.

__ was found guilty on count(s) __ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section

21:846, 841(a)(1) & (b)(1)(C)

21:841(a)(1) & (b)(1)(C) & 18:2

18:924(c)(1)(A)(ii), (c)(1)(C)(i) & 2

18:922(j), 924(a)(2) & 2

Nature of Offense

Conspiracy: distributed oxycodone

Distributed oxycodone

Carried and used, by brandishing, firearms during drug trafficking crime

Possessed stolen firearms

Date Offense Concluded	Count Number(s)
01/14/2005	3s
11/30/2004	7s
11/30/2004	8s
1/14/2005	18s

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

__ The defendant has been found not guilty on count(s)

X Counts 3, 4, and 6 of the superceding indictment filed September 26, 2005 and Counts 4s, 15s, 16s and 17s of the superceding indictment filed February 1, 2006 are dismissed upon the motion of the defendant without objection of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay retitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

*October 3, 2006
Date of imposition of Judgment

/s/ William l. Osteen
Signature of Judicial Officer

William L. Osteen, United States District Judge
Name & Title of Judicial Officer

October 4, 2006
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[ENTERED: October 30, 2007]

FILED
October 30, 2007

No. 06-4815
1:05-cr-00315-2

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

JOHN MCKINLEY BEESON

Defendant – Appellant

O R D E R

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

Entered for a panel composed of Chief Judge Williams, Judge Wilkinson, and Judge King.

For the Court,

/s/ Patricia S. Connor
CLERK

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. § 922(j)

(j) It shall be unlawful for any person to receive, possess, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition, or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is a part of, which constitutes, or which has been shipped or transported in, interstate or foreign commerce, either before or after it was stolen, knowing or having reasonable cause to believe that the firearm or ammunition was stolen.

18 U.S.C. § 924(a)(2)

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 924(c)(1)(A)(ii)

(c) (1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years

18 U.S.C. § 3553

(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994 (a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(ii) that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994 (a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28, United States Code, subject to any

amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994 (p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general

(2)
Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only

the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses

(A) 2 Sentencing

In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994 (a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of Reasons for Imposing a Sentence.— The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence Procedure for an Order of Notice.— Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) **Limited Authority To Impose a Sentence Below a Statutory Minimum.**— Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on Applicability of Statutory Minimums in Certain Cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841(b)(1)(C)

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. § 994

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563 (b) of title 18;

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553 (a)(2) of title 18, United States Code, including the appropriate use of—

(A) the sanctions set forth in sections 3554, 3555, and 3556 of title 18;

(B) the conditions of probation and supervised release set forth in sections 3563 (b) and 3583 (d) of title 18;

(C) the sentence modification provisions set forth in sections 3563 (c), 3564, 3573, and 3582 (c) of title 18;

(D) the fine imposition provisions set forth in section 3572 of title 18;

(E) the authority granted under rule 11(e)(2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11 (e)(1); and

(F) the temporary release provisions set forth in section 3622 of title 18, and the prerelease custody provisions set forth in section 3624 (c) of title 18; and

(3) guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section

3565 of title 18, and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in section 3583 (e) of title 18.

(b)

(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code.

(2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents

of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense;

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or

imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

(e) The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant.

(f) The Commission, in promulgating guidelines pursuant to subsection (a)(1), shall promote the purposes set forth in section 991 (b)(1), with particular attention to the requirements of subsection 991(b)(1)(B) for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities.

(g) The Commission, in promulgating guidelines pursuant to subsection (a)(1) to meet the purposes of sentencing as set forth in section 3553 (a)(2) of title 18, United States Code, shall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to

minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952 (a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 App. U.S.C. 1901 et seq.); and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952 (a), 955, and 959), and the Maritime Drug Law Enforcement Act (46 App. U.S.C. 1901 et seq.).

(i) The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—

(1) has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions;

(2) committed the offense as part of a pattern of criminal conduct from which the defendant derived a substantial portion of the defendant's income;

(3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering activity in which the defendant participated in a managerial or supervisory capacity;

(4) committed a crime of violence that constitutes a felony while on release pending trial, sentence, or appeal from a Federal, State, or local felony for which he was ultimately convicted; or

(5) committed a felony that is set forth in section 401 or 1010 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 841 and 960), and that involved trafficking in a substantial quantity of a controlled substance.

(j) The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been

convicted of a crime of violence or an otherwise serious offense, and the general appropriateness of imposing a term of imprisonment on a person convicted of a crime of violence that results in serious bodily injury.

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

(l) The Commission shall insure that the guidelines promulgated pursuant to subsection (a)(1) reflect—

> **(1)** the appropriateness of imposing an incremental penalty for each offense in a case in which a defendant is convicted of—
>
> > **(A)** multiple offenses committed in the same course of conduct that result in the exercise of ancillary jurisdiction over one or more of the offenses; and
> >
> > **(B)** multiple offenses committed at different times, including those cases in which the subsequent offense is a violation of section 3146 (penalty for failure to appear) or is committed while the person is released pursuant to the provisions of section 3147 (penalty for an offense committed while on release) of title 18; and

(2) the general inappropriateness of imposing consecutive terms of imprisonment for an offense of conspiring to commit an offense or soliciting commission of an offense and for an offense that was the sole object of the conspiracy or solicitation.

(m) The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553 (a)(2) of title 18, United States Code.

(n) The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated

pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that

the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

(q) The Commission and the Bureau of Prisons shall submit to Congress an analysis and recommendations concerning maximum utilization of resources to deal effectively with the Federal prison population. Such report shall be based upon consideration of a variety of alternatives, including—

(1) modernization of existing facilities;

(2) inmate classification and periodic review of such classification for use in placing inmates in the least restrictive facility necessary to ensure adequate security; and

(3) use of existing Federal facilities, such as those currently within military jurisdiction.

(r) The Commission, not later than two years after the initial set of sentencing guidelines promulgated under subsection (a) goes into effect, and thereafter whenever it finds it advisable, shall recommend to the Congress that it raise or lower the grades, or otherwise modify the maximum penalties, of those offenses for which such an adjustment appears appropriate.

(s) The Commission shall give due consideration to any petition filed by a defendant requesting modification of the guidelines utilized in the

sentencing of such defendant, on the basis of changed circumstances unrelated to the defendant, including changes in—

(1) the community view of the gravity of the offense;

(2) the public concern generated by the offense; and

(3) the deterrent effect particular sentences may have on the commission of the offense by others.

(t) The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582 (c)(1)(A) of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

(v) The Commission shall ensure that the general policy statements promulgated pursuant to subsection (a)(2) include a policy limiting consecutive terms of imprisonment for an offense involving a violation of a general prohibition and for an offense

involving a violation of a specific prohibition encompassed within the general prohibition.

(w)

(1) The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—

(A) the judgment and commitment order;

(B) the statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range);

(C) any plea agreement;

(D) the indictment or other charging document;

(E) the presentence report; and

(F) any other information as the Commission finds appropriate.

(2) The Commission shall, upon request, make available to the House and Senate Committees on the Judiciary, the written reports and all

underlying records accompanying those reports described in this section, as well as other records received from courts.

(3) The Commission shall submit to Congress at least annually an analysis of these documents, any recommendations for legislation that the Commission concludes is warranted by that analysis, and an accounting of those districts that the Commission believes have not submitted the appropriate information and documents required by this section.

(4) The Commission shall make available to the Attorney General, upon request, such data files as the Commission may assemble or maintain in electronic form that include any information submitted under paragraph (1). Such data files shall be made available in electronic form and shall include all data fields requested, including the identity of the sentencing judge.

(x) The provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of guidelines pursuant to this section.

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,	) Criminal Action No. 1:05CR315-2
vs.	)
JOHN MCKINLEY BEESON, Defendant.	) Greensboro, North Carolina March 28, 2006 9:15 a.m. (Pages 1-33)

TRANSCRIPT OF CHANGE OF PLEA HEARING

BEFORE THE HONORABLE
WILLIAM L. OSTEEN, SR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:	KEARNS DAVIS, ESQUIRE Assistant United States Attorney Post Office Box 1858 Greensboro, North Carolina 27401
For the Defendant:	A. WAYNE HARRISON, ESQUIRE 101 South Elm Street, Suite 230 Greensboro, North Carolina 27401

Court Reporter: Mary Jo Beck, RMR, CRR
Room 101, U.S. Courthouse Building
324 West Market Street
Greensboro, North Carolina 27401

Proceedings reported by stenotype reporter.
Transcript produced by computer-aided transcription.

* * * * *

A. No, sir.

Q. Now, the plea agreement, as I understand it, requires that – calls for you to tender a plea of guilty to Counts, 3, 7, 9, and 18. Is that correct?

A. Yes, sir.

Q. In return for that plea, and as an additional matter on your part, which I will mention in just a moment, the Government has agreed that once you are sentenced on these four counts, then the Government will make a motion – will not oppose Mr. Harrison's motion to dismiss the remaining counts in this indictment.

Now, the Government specifically has referred to Count 17, I think. Yes. And in that the dismissal takes place, but in return for that you are agreeing that you will give up all of your rights to appeal or attack whatever the Court does in this case in the way of sentencing in the matter, or anything else in connection with this case, either on direct appeal or through an attack by way of a 2255 proceeding, or any other way.

You are giving up all of your rights to appeal or attack this sentence, except for four things: One is, if there is a prosecutorial misconduct, then you would not give up your right to appeal.

Secondly, if you feel that your attorney has not done a professional job, then that would be another ground for appeal.

Thirdly, if the Court should sentence you to a term of imprisonment that is more than the maximum which the Court can give you, that would be grounds for appeal

And fourthly, if the court sentences you improperly because of your race, creed, color, national origin, anything of an unconstitutional means that the Court uses to sentence you, you would have a right to appeal on that ground.

So, there are four grounds only that you would have left after this agreement. Do you understand that?

A. Yes, sir.

Q. Now, do you understand that each one of the charges to which you are pleading guilty here is a felony?

A felony is any crime punishable by more than one year imprisonment, and each one of these four is just that.

That means that you would lose your civil rights, among those being the right to vote, the right to hold public office, and the right to serve on a jury. And the one that gets most people back into trouble is a you're giving up your right to own or to possess a firearm, which essentially means that you have to be away from firearms unless and until your civil rights are restored or somebody will charge you perhaps with possession or owning a firearm.

Do you understand you are giving up all of these right?

A. Yes, sir.

Q. Now, I have attempted to read all of the obligations that I see on the part of the Government in return for your plea of guilty, and your obligations, too.

Is that a fair summary of the obligations on each part?

A. Yes.

Q. Has the government promised you anything outside this plea agreement, that is, orally, or has the Government indicated to you in any way that there would be other rewards for you for entering into this plea agreement?

A. No, sir.

Q. Did anybody make any threats or promises to you to get you to sign the plea agreement?

A. No, sir.

Q. Now, gentlemen, if you will watch carefully also, because I am now going to review what I think is the